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215731

February 2, 2006

## BY HAND

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: Docket No. 42095, *Kansas City Power & Light Co. v. Union Pacific Railroad Company*

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of Union Pacific's Reply to Motion to Compel.

Please indicate receipt and filing by date-stamping the enclosed extra copy and returning it to our messenger.

Thank you for your assistance.

Sincerely,



Michael L. Rosenthal

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

215731

KANSAS CITY POWER & LIGHT COMPANY,

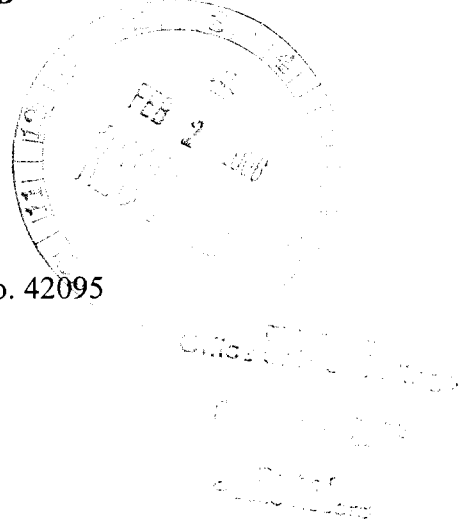
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Docket No. 42095



**UNION PACIFIC'S REPLY TO MOTION TO COMPEL**

Defendant Union Pacific Railroad Company ("UP") hereby replies to the motion to compel filed by Kansas City Power & Light Company ("KCPL") on January 23, 2006. That motion covers KCPL's Requests for Production ("RFPs") 1, 2, 37, and 38 and Interrogatory 9.

The Board should deny KCPL's motion. KCPL is seeking information related to UP's internal management costing system. The Board has consistently refused to compel carriers to produce information related to their internal management costing systems, and it should refuse here. *See Potomac Electric Power Co. v. CSX Transp., Inc.*, 2 STB 290 (1997) ("PEPCO"); *Arizona Pub. Serv. Co. v. The Atchison, Topeka & Santa Fe Ry.*, 2 STB 367 (1997) ("APS"); *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, STB Docket No. 42038 (STB served July 8, 1999) ("DMIR"); *Texas Mun. Power Agency v. The Burlington Northern & Santa Fe Ry.*, STB Docket No. 42056 (STB served Feb. 9, 2001) ("TMPA"); *Northern States Power Co. v. Union Pacific R.R.*, STB Docket No. 42059 (STB served May 24, 2002) ("NSP").

KCPL offers no valid basis for distinguishing this case from the others. With respect to RFPs 1 and 2, KCPL argues that it is entitled to information related to UP's internal

management costing system because UP might assert the need to increase “profitability” as “independent grounds for the approval of a significant increase in captive coal rates.” (Motion at 7.) As we discuss below, however, UP will *not* argue that its need to increase profitability provides an independent ground for approving rates in excess of those calculated based on properly calculated variable or stand-alone costs. Moreover, UP will *not* make any arguments in this case based on analyses from its internal management costing system. UP’s representations eliminate the basis for KCPL’s motion with respect to RFPs 1 and 2.

With respect to RFPs 37 and 38 and Interrogatory 9, KCPL argues that it is entitled to the “operating and financial *inputs* that UP relies upon” for its internal management costing system. (Motion at 16, emphasis in original.) It claims that its position is “consistent with precedent” (*Id.*) Astonishingly, KCPL fails to acknowledge that the Board has twice rejected the same exact argument for the same exact discovery. *See DMIR* at 3; *NSP* at 8-9.

#### **RFP 1: Process Used to Establish the Challenged Rates**

The Board does not need to address issues involving internal management costing systems in order to deny KCPL’s motion with respect to RFP 1. RFP 1 seeks information that is irrelevant to any issue in a stand-alone cost case. KCPL mischaracterizes RFP 1 as seeking “data regarding . . . the profitability of the transportation at issue in this proceeding.” (Motion at 6.) RFP 1 actually seeks information about how UP established the KCPL rate and service terms contained in Item 4140 of UP Circular 111. RFP 1 states:

Please produce all documents related to the preparation of Item 4140-C to UP Circular 111, attached as Exhibit B to the Complaint in this case, and all predecessor publications thereto, including but not limited to the documents used and/or relied upon in determining the level of the Challenged Rates.

UP's process for establishing KCPL's rates and service terms is not relevant to the issues in this case. KCPL does not need information about how UP established the rates and service terms in order to challenge their reasonableness in a stand-alone cost case. The reasonableness of the challenged rates and service terms does not depend on the process for establishing them. Moreover, KCPL never attempts to explain why it needs this discovery. It does not allege that the challenged rates reflect any "gaming" by UP. Nor does it point to any other allegations that make the information it seeks relevant to the issues in this proceeding. KCPL thus has not met the basic, minimum standard for discovery in rate cases; it has not "demonstrated a real, practical need for the information." *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985).<sup>1</sup>

UP also objects to producing information related to its internal management costing system in response to RFP 1 for the reasons we describe below, but KCPL's failure to demonstrate a real, practical need for any of the information requested is reason enough for the Board to deny the motion to compel with respect to RFP 1.<sup>2</sup>

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<sup>1</sup> KCPL misstates the applicable discovery standard. KCPL asserts that it is entitled to discovery of "any non-privileged matter which is relevant to the subject matter involved in a proceeding." (Motion at 5.) However, a different standard applies in stand-alone cases. In stand-alone cases, in recognition of the burden on railroads to respond to legitimate discovery requests, the Board imposes a special obligation on shippers to demonstrate that their requests are relevant. The Board "require[s] more than a minimal showing of potential relevancy before [it] will grant a motion to compel discovery." *PEPCO*, 2 S.T.B. at 292. Instead, shippers "must demonstrate a real practical need for the information," and their requests "must be reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information." *Coal Rate Guidelines*, 1 I.C.C.2d at 548. In this case, KCPL does not meet even the lower standard it has set for itself.

<sup>2</sup> KCPL apparently linked RFP 1 and RFP 2 in its motion to compel because of an offer that UP made in an effort to resolve discovery disputes with KCPL. As part of that effort, UP offered to produce documents responsive to RFP 1 and 2, except for documents that related to its internal management costing system. See Letter from M. Rosenthal to K. Dowd, dated Dec. 23, 2005, p. 2 (Attachment A hereto). UP's objection to producing information related to its internal (continued...)

## **RFP 2: Profitability Studies**

In RFP 2, KCPL asked for studies related to the “profitability” of UP coal traffic and the coal transportation service provided by UP for the account of KCPL. As part of its effort to resolve discovery disputes with KCPL, UP offered to produce responsive documents, except for documents that relate to its internal management costing system.<sup>3</sup> UP’s internal management costing system is not relevant to an evaluation of the reasonableness of the rate in this case, is proprietary, and production of the system itself or the results produced by that system would be extremely burdensome. Any need for data from UP’s internal management costing system is far outweighed by the burden of producing the material and the harm that would be occasioned by its disclosure.

There is no need for the requested discovery. KCPL says that it seeks UP’s internal management costing data because of its concern that UP may claim “the need to increase profitability of [its] coal traffic as an independent ground for the approval of significant increases in captive coal rates.” (Motion at 7.) KCPL says that any such a claim “has no place” in this case because the *Coal Rate Guidelines* which allow defendants to charge only a rate that is “no lower than the higher of 180% of the variable cost of service, or a stand-alone cost-based rate.” (*Id.* at 7-8.) But KCPL says that it is entitled to discovery because such a claim is one of UP’s “expected defenses in this case.” (*Id.* at 9.)

KCPL’s concerns are misplaced. UP will *not* argue in this case that its need to increase the profitability of its coal traffic provides an independent ground for charging a rate

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management costing system is different from and in addition to its broader objection to producing *any* documents showing how it established the challenged rates.

<sup>3</sup> See Letter from M. Rosenthal to K. Dowd, dated Dec. 23, 2005, p. 2 (Attachment A).

that is more than the greater of 180% of the variable cost of service or a stand-alone cost-based rate. This representation should eliminate any basis for KCPL's motion to compel with respect to RFP 2.

UP does not wish to mislead KCPL or the Board. UP may make arguments in this proceeding about the proper methodologies for calculating the variable costs or the stand-alone costs of serving KCPL. It may argue that variable cost or stand-alone cost methodologies advocated in this case by KCPL or applied in past cases by the Board would result in revenues that are inconsistent with statutory revenue adequacy provisions and the need to invest in railroad infrastructure to meet existing and future demand. It may argue that alternative calculations for variable costs or stand-alone costs would produce results that are more consistent with railroad revenue adequacy and investment concerns.<sup>4</sup> Contrary to KCPL's concern, however, UP will *not* argue that revenue adequacy or investment concerns provide an independent basis for overriding the results of the variable cost or stand-alone cost tests.<sup>5</sup>

Moreover, UP will *not* make any arguments based on analyses from its internal management costing system. KCPL refers to several proceedings in which UP has made statements about the need to earn greater revenues in order make necessary investments in infrastructure and argues that UP put its internal management costing system at issue by making those statements. (Motion at 8-9, 10 n.6.) UP did not base its statements in those proceedings on

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<sup>4</sup> These types of arguments for alternative methodologies would be no different than shipper challenges to the percentage-reduction method or arguments for the use of a productivity-adjusted indexing factor.

<sup>5</sup> UP denies KCPL's assertion that counsel for UP made statements to the contrary at the parties' discovery conference on December 14, 2005. (Motion at 8.) UP also disagrees with KCPL's characterization of statements made at the staff-supervised discovery conference on January 13, 2006. (*Id.*) Although the parties' recollections or interpretations of conversations apparently differ, this pleading sets forth UP's position and commitment in this proceeding.

internal management costing data, and UP thus denies that it has placed its costing system at issue in any Board proceeding. UP's arguments in this case will also be based on data that are available to KCPL and the Board.

These representations should resolve KCPL concerns. But even if they do not, the Board still should not compel UP to produce information relating to its internal management costing system. Whatever its concerns, KCPL cannot "demonstrate a real, practical need" for such information, because the Board "would not use a carrier's internal costing system for any purpose in [its] analysis and decision" in a stand-alone cost case. *APS*, 2 S.T.B. at 372.<sup>6</sup>

The issues in a stand-alone cost case require the analysis of actual cost data. UP is producing vast amounts of cost data in response to numerous specific discovery requests made by KCPL, as we discuss in more detail below. KCPL will have access to these data, as well as other sources information about UP.<sup>7</sup> KCPL will be able to use these data to formulate whatever arguments it wants to make or "to test the results of any coal profitability studies that may be

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<sup>6</sup> There is no support for KCPL's motion in the three cases KCPL cites as "precedent" for allowing discovery of "management cost data." (Motion at 9-10 & p.10 n.5.). In those cases, the Interstate Commerce Commission allowed discovery so that shippers could pursue claims under the Long-Cannon "management efficiency standard," not the stand-alone cost standard. See *San Antonio, Texas v. Burlington Northern R.R.*, ICC Docket No. 36180 (ICC served Dec. 5, 1986), p. 7 ("[T]he information is reasonably calculated to lead to the discovery of admissible evidence relative to the management efficiency standard of 49 U.S.C. § 10704(a)(2)."); *Arizona Electric Power Coop. v. The Atchison, Topeka, & Santa Fe Ry.*, ICC Docket No. 37437 (ICC served Oct. 23, 1986), p. 5 (same); *Arkansas Power & Light Co. - Petition to Institute Rulemaking Proceeding - Implementation of Long-Cannon Amendment to the Staggers Rail Act*, 365 I.C.C. 983, 997 (1982) ("If the discovery requests are reasonable, the railroads may not generally refuse to provide information about their costs of providing service on the grounds that cost information is proprietary.").

Even if those decisions have any continuing relevance in light of the Board's line of cases denying discovery into a carrier's internal cost management systems, KCPL's allegations in this case do not implicate the "management efficiency standard," and KCPL does not claim to be seeking evidence to pursue such a case in its Motion.

<sup>7</sup> KCPL itself asserts that it could refute arguments UP might make about "profitability" using a "plethora of published reports." (Motion at 9.)

introduced by the defendant.” (Motion at 10.) The Board has affirmed repeatedly that there is no value to be gained by delving into the complicated, subsidiary issue of whether a railroad’s internal approach to management costing has any bearing on the issues in a stand-alone cost case. *See, e.g., PEPCO*, 2 S.T.B. at 293 & n.13 (“Use of the carriers’ costing system would require that we review all of the programs and assumptions that affect the output of the costing models.”). The introduction of disputes about a carrier’s internal management costing system and arguments about how it compares to URCS or stand-alone costing would only add another layer of complexity to proceedings that shippers complain are already too costly and complex.

Finally, there is no merit to KCPL’s assertion that its request for the “results” of analyses conducted using UP’s internal management costing system is drawn “narrowly.” (Motion at 10.) Complying with KCPL’s request would be unduly burdensome. UP uses its internal management costing system to conduct a wide range of analyses to guide day-to-day business decisions, including marketing, finance, and service design issues, as well as to review historic performance from marketing, financial, an operating perspectives. At the very least, UP would have to engage in a wide-ranging search through the files of all its coal customers, as well as files throughout its Marketing, Finance, and Operating Departments.

Moreover, KCPL’s counsel made clear in discussions with UP’s counsel that KCPL expects more than just numerical “results.” KCPL’s counsel stated, and UP agrees, that for the “results” to have any value at all, KCPL would need to know what they represent. UP would likely have to explain what cost data it uses; how it allocates costs and revenues; how it derives variability factors; and how its results differ from those derived using URCS or stand-alone costs. However, this is precisely the type of information that makes UP’s internal management costing system proprietary and highly sensitive. This also demonstrates why the



Board has found that the already complex record in a coal rate case would be burdened by the inclusion of evidence and argument about internal costing models that differ from its General Purpose Costing System.

The Board has consistently protected such information from disclosure in rate cases, distinguishing the complainant's right to relevant cost data from the complainant's right to learn how or whether a carrier uses those data as part of its internal cost management system. *See NSP* at 9 (“[R]equiring [a carrier] to reveal [the latter] sort of information would be tantamount to giving access to [the carrier’s] proprietary costing system.”); *DMIR* at 3 (same); *PEPCO*, 2 S.T.B at 293-94 (explaining that complainant “[did] not require access to the railroads’ costing models, but rather information on actual costs and traffic data, which the railroads have already produced during discovery”).

**RFPs 37 and 38 and Interrogatory 9: UP’s Internal Costing Methodology**

KCPL’s motion to compel a response to RFPs 37 and 38 and Interrogatory 9 comes as a surprise to UP, because KCPL has previously insisted that those requests were not intended to require production of management cost data. KCPL’s new position – that it is indeed entitled to internal management cost data in response to these requests – was decisively rejected by the Board in the very decision in *DMIR* that KCPL cites to support its argument (*see DMIR* at 3), as well as in a subsequent case in which the shipper also tried to rely on that same decision. *See NSP* at 8-9 (“Contrary to NSP’s claim, the decisions cited by NSP to support its discovery requests in RFP’s 37 and 38 in fact support UP’s position that we should not permit discovery of these types of data . . .”). KCPL’s failure to acknowledge this adverse precedent is quite troubling.

UP is surprised by KCPL's motion to compel because, after UP responded to RFPs 37 and 38 and Interrogatory 9 by objecting to the production of documents related to its internal management costing system, KCPL's counsel insisted that KCPL was not seeking such information. KCPL's counsel wrote: "The data descriptions, inputs and cost information sources sought in Interrogatory No. 9 and Document Request Nos. 37 and 38 did not include UP's 'internal costing system' and therefore was not objectionable . . . ."<sup>8</sup>

UP's counsel responded that the parties did not appear to have any real dispute: "We will be producing a tremendous amount of UP data regarding UP's costs in response to other KCPL discovery requests that appear to cover the same subject matters as these three requests. UP's 'internal cost' objection does not relate to the production of such cost data."<sup>9</sup> Moreover, in discussions between counsel for UP and KCPL, including discussions at the staff-sponsored discovery conference, UP's counsel repeatedly told KCPL's counsel that UP would be open to requests for production of additional data, if KCPL could point to any data requested in RFPs 37 and 38 and Interrogatory 9 that were not covered by the many other discovery requests propounded by KCPL. KCPL never responded by requesting additional data. Instead, it filed a motion to compel.

In its motion, KCPL now maintains that it was in fact seeking discovery of "management cost data." (Motion at 14.) It says that it needs such data in order to calculate line-specific costs. (*Id.* at 15.) It asserts that UP has hindered its ability to develop line-specific costs because UP has stopped maintaining the data that shippers need, "other than under the

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<sup>8</sup> Letter from K. Dowd to M. Rosenthal, dated Dec. 29, 2005, p. 3 (Attachment B hereto).

<sup>9</sup> Letter from M. Rosenthal to K. Dowd, dated Jan. 3, 2006, p. 6 (Attachment C hereto).

rubric of ‘management costs.’” (*Id.*) However, KCPL identifies only a single example of this alleged phenomenon: its inability to obtain “train dispatcher sheets.” (*Id.*)

KCPL’s allegations are offensive and wrong. UP has not stopped maintaining any data to prevent shippers from attempting to develop line-specific costs for use in rate cases. Moreover, UP has repeatedly told KCPL that it is willing to produce relevant data, but it is not willing to produce information that would show what data it uses or how it analyzes that data for internal costing purposes.

KCPL attempts to support its allegations by offering only one example of data that it says have become unavailable – train dispatcher sheets. KCPL asserts that UP was able to produce train dispatcher sheets in *NSP* but is now unable to produce them to KCPL. (Motion at 15.) KCPL’s assertion is absolutely false. UP’s response to KCPL’s discovery request for “data recorded in train dispatcher sheets” was precisely the same as UP’s response to the same request in *NSP*.<sup>10</sup> When counsel for KCPL inquired about UP’s response, UP’s counsel explained that UP does not use paper “train dispatcher sheets,” but instead maintains the data in an electronic format.<sup>11</sup> UP’s counsel also explained that production of the requested data would be extremely burdensome, and that UP had never produced more than a sample of the data in a

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<sup>10</sup> See *Northern State Power Co. v. Union Pacific R.R.*, STB Docket No. 42059, UP’s Response to NSP’s RFP 51 (Attachment D hereto).

<sup>11</sup> This is not a recent development – UP has not used paper train dispatching sheets since well before the *NSP* case. See *Northern States Power Co. v. Union Pacific R.R.*, STB Docket No. 42059, UP’s Response to NSP’s Motion to Compel, Verified Statement of Samuel M. Gomez (“Gomez VS”), pp. 5-7 (Attachment E hereto).

Moreover, UP’s production of information in response to specific discovery requests will contain the same basic information that KCPL says it seeks from train dispatcher sheets. For example, UP’s coal train movement records, which were produced in response to RFP 4, contain detailed records that include the dates and times at which each train passes specified waypoints, as well as locomotive and consist information for each train. UP’s response to RFPs 25 and 88 will include detailed information on incidents and failures resulting in train delays.

rate case. UP gave the same explanation to both the shipper and the Board in *NSP*, as is clearly reflected in the Board's decision in *NSP*. See *NSP* at 3-4.<sup>12</sup> KCPL's counsel appeared to accept UP's explanation, and KCPL's request for train dispatcher data had never come up again, until KCPL filed its motion to compel.

KCPL's final argument is the extremely misleading assertion that KCPL's requests are "consistent with precedent." (Motion at 16.) KCPL asserts that its requests are "consistent with precedent" because they "are limited to the operating and financial *inputs* that UP relies upon" for internal management costing. (*Id.* at 16, emphasis in original.)<sup>13</sup> There is, to be sure, precedent for *requesting* such "inputs." But the Board has rejected those requests in every case in which they have been made, recognizing that "requiring [the carrier] to reveal that sort of information would be tantamount to giving access to [its] proprietary costing system." *DMIR* at 3; accord *NSP* at 8-9. The Board should adhere to that precedent and reject KCPL's requests in this case.

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<sup>12</sup> See also *Gomez VS*, pp. 5-7 (Attachment E hereto).

<sup>13</sup> In fact, unlike the shipper's requests in *NSP*, KCPL's requests are not limited to *inputs*. KCPL's requests are precisely the same as the broader requests that the Board rejected in *TMPA*. See *TMPA* at 3. Attachment F compares the discovery requests from *KCPL*, *NSP*, and *TMPA*.

Respectfully submitted,



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*Attorneys for Union Pacific Railroad Company*

February 2, 2006

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 2nd day of February, 2006, I caused a copy of Union Pacific's Reply to Motion to Compel to be served by hand on Kelvin J. Dowd of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036.

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal

A

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December 23, 2005

## **BY FACSIMILE AND FIRST-CLASS MAIL**

Kelvin J. Dowd, Esq.  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, DC 20036

Re: Finance Docket No. 42095, Kansas City Power &  
Light Company v. Union Pacific Railroad Company

Dear Kelvin:

We are writing to follow up on several items discussed during the parties' December 14 meet-and-confer session and to confirm agreements and understandings reached at that meeting. If your recollections vary from ours, please let us know immediately so we can work to resolve any differences.

### Issues Related to Both Parties' Discovery Requests

#### Discovery Cut-Off

The parties agreed to a discovery cut-off of December 31, 2005. We understand this to mean that neither party will produce or rely upon movement-specific data (e.g., shipment characteristics, cycle times, crew wages) for shipments occurring after December 31, 2005, and neither party will be required, except as otherwise specifically agreed, to search for and produce documents created after December 31, 2005. We further understand that the discovery cut-off date will not foreclose either party from relying on data that become publicly available on or after January 1, 2006 (e.g., RCAF indices, UP's Annual Report) for calculating costs.

#### Business Records

The parties agreed that each party could rely upon the internal documents produced by the other party as the business records of that party. The parties thus agreed to withdraw their reciprocal requests for witness identification.



Issues Related to KCPL's Discovery Requests to UP

1. Request to Expedite Production

At the meet-and-confer session, you identified several categories of documents that KCPL considers a high priority for discovery. The categories were: (i) traffic tapes, (ii) track charts and timetables, (iii) coal contracts and other coal pricing authorities, (iv) UP's traffic forecasts, and (v) train movement data for KCPL trains. UP agreed to expedite production of these documents, though we explained that UP's 2006 forecast would not be available until it is completed sometime in January 2006. UP also agreed to expedite production of lists with respect to its responses that offered to produce a reasonable number of documents (e.g., coal car leases, locomotive leases) from lists to be provided by UP.

2. Documents Related to Non-Coal Traffic

At the meet-and-confer session, we explained that UP objected to producing documents related to non-coal traffic because we did not expect KCPL to include non-coal traffic in its stand-alone railroad and in many instances the production of documents related to non-coal traffic would greatly increase the burden associated with responding to KCPL's discovery requests. We told you that UP will produce traffic data that includes non-coal traffic, so that KCPL can determine whether it truly wants to include non-coal traffic in its stand-alone railroad. We also explained that UP will produce non-coal data where it would be more burdensome to exclude non-coal data from other documents we intend to produce.

The parties agreed to revisit other issues regarding KCPL's requests for non-coal data if, after reviewing the traffic data, KCPL represents that it will include non-coal traffic in its stand-alone railroad.

3. Documents Withheld Under UP General Objection 16

UP agreed to inform KCPL if it withholds any documents based on its General Objection 16. UP told KCPL that the only documents currently being withheld based on this objection are FIST accounting data related to Document Request No. 9.

4. Item 4140 and Profitability Studies (Doc. Req. Nos. 1 and 2)

At the meet-and-confer session, you explained KCPL's reasons for propounding these requests, and UP agreed to take the issue under advisement.

We now agree to produce the requested documents, subject to UP's general objections and its specific objections to producing documents related to UP's internal costing system.

COVINGTON & BURLING

Kelvin J. Dowd, Esq.  
December 23, 2005  
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5. Planned Capacity Enhancements (Doc. Req. No. 3)

At the meet-and-confer session, you explained KCPL's concern that UP's response would not include capacity enhancements that were planned but not yet completed. In response to UP's concerns about burden, you said that KCPL would modify the request to seek only documents "sufficient to show" planned capacity improvements on UP rail lines used for the transportation of coal from mines in Wyoming.

We have considered your proposed modification, and we now agree to include in our response documents sufficient to show any currently planned but not-yet-completed capacity enhancements or capital improvements on the UP lines used for the transportation of coal from mines in Wyoming to utilities in the Midwest or Eastern U.S.

6. Railcar Repair and Maintenance (Doc. Req. No. 36)

At the meet-and-confer session, we explained the burdens involved in complying with this request, which literally seeks repair and maintenance records and related documents for all of the cars on the UP system. You asked whether UP had a study of railcar repair and maintenance similar to the study of locomotive repair and maintenance that we will produce in response to RFP No. 19. We agreed to make inquiries and get back to you. We are still trying to determine whether UP has responsive documents that could be produced without imposing an undue burden on UP.

7. Traffic Forecasts (Doc. Req. No. 53)

At the meet-and-confer session, we agreed to produce UP's official traffic forecasts and projections that are used in operations and capital planning. As noted above, notwithstanding the discovery cut-off, we agreed to produce UP's traffic forecast for 2006, which we expect to be completed in January 2006.

8. Construction Projects (Doc. Req. Nos. 115 and 116)

At the meet-and-confer session, you indicated that KCPL was seeking more in response to these requests than AFEs. You said that KCPL was seeking documents such as specifications, bids, and handbooks, as well as documents that would show cost sharing with public entities. We agreed to explore whether UP could develop a workable proposal that would involve more than access to AFEs. We are still trying to determine whether we can develop a workable proposal that would allow KCPL access to additional documents without imposing an undue burden on UP.

COVINGTON & BURLING

Kelvin J. Dowd, Esq.  
December 23, 2005  
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Issues Related to UP's Discovery Requests to KCPL

1. Documents Withheld Under KCPL General Objection No. 5

At the meet-and-confer session, you stated that KCPL will withhold documents based upon its "confidentiality" objection only when responsive documents are subject to a confidentiality agreement with a non-party, that KCPL will inform UP if such an issue arises, and that KCPL will attempt to address any confidentiality issues with the affected non-parties.

2. Documents Withheld Under Objection to Producing "All" Documents

At the meet-and-confer session, you stated that KCPL will not rely on its objection to producing "all" documents to withhold production of responsive information. You stated that KCPL was objecting only to producing multiple copies of documents or multiple documents containing the same information.

3. Objection Relating to Business Records

At the meet-and-confer session, you clarified that when KCPL objected to interrogatories based on its "option to produce business records," KCPL intended to state that it will produce responsive business records.

4. Coal Contracts and Related Documents (RFP Nos. 3 and 4)

At the meet-and-confer session, you confirmed that KCPL will produce all contracts in force at any time during the period from 1999 to the present, and stated that it will produce documents relating to contracts in force at any time from 2002 to the present.

5. Fuel Surcharges (RFP No. 13)

At the meet-and-confer session, the parties discussed KCPL's objection to producing information about fuel surcharges related to generation facilities that will not be included in KCPL's stand-alone traffic group and the parties' understanding of the term "fuel surcharges." We explained that UP is entitled to broader discovery than KCPL was initially willing to provide, particularly because of the vaguely defined nature of KCPL's challenge to UP's fuel surcharge. We also pointed out that UP had agreed to KCPL's requests to produce documents relating to UP's fuel surcharge.

We believe the parties made significant progress during the meet and confer and may, in fact, be in accord on the appropriate scope for KCPL's response. We would appreciate your confirmation that KCPL will produce all non-privileged documents relating to fuel surcharges and the recovery of fuel costs for rail transportation generally, and that it will not withhold such documents on the basis that they relate to facilities not included in the

COVINGTON & BURLING

Kelvin J. Dowd, Esq.  
December 23, 2005  
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stand-alone traffic group. We would also appreciate your confirmation that KCPL will define the term "fuel surcharges" broadly to include any mechanism in a railroad contract, tariff, or similar price document intended to provide for recovery of increases in fuel prices.

6. Documents Comparing Rates/Service at Montrose to Rates/Services at Other Facilities (RFP No. 14)

KCPL initially objected to producing any documents in response to this request. At the meet-and-confer session, we explained that KCPL made the requested documents relevant by including unreasonable practices charges in its Complaint. You appeared to agree that evidence of rate/service terms for generating facilities other than Montrose might be relevant to whether UP's tariff provisions are unreasonable.

In an effort to arrive at a compromise, we asked whether KCPL would be willing to produce documents relating to KCPL's negotiations with respect to its other facilities. You said you would take under advisement the possibility of producing contracts between KCPL and BNSF for coal transportation to KCPL's facilities other than Montrose.

In a telephone call today, you said that KCPL will produce its agreements with BNSF if UP will accept this production as a sufficient response to RFP No. 14. We appreciate your offer, and we would be willing to modify our request to seek only the agreements and documents reflecting the negotiations between KCPL and BNSF that resulted in the agreements.

Please let us know whether KCPL will accept this compromise.

7. Dispatching Decisions (RFP No. 15)

KCPL initially objected to producing any documents in response to this request. At the meet-and-confer session, you stated that you would determine whether KCPL can provide its dispatching model in response to UP's Request No. 15(e).

Please let us know as soon as possible whether KCPL will produce its dispatching model or, if not, whether it has an alternative proposal for producing information regarding its dispatching decisions.

8. Studies, Forecasts, and Projections (RFP No. 16)

At the meet-and-confer session, you stated that despite KCPL's objection to producing information related to generating facilities that will not be included in the stand-alone traffic group, KCPL would produce national, regional, or PRB forecasts of the types requested in UP's Request No. 16.

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We would appreciate confirmation that KCPL will not withhold documents containing responsive information about studies, forecasts, and projections for Montrose on the grounds that documents also contain information about plants other than Montrose.

9. Gain or Loss of Customers (RFP Nos. 17 and 18)

At the meet-and-confer session, you stated that KCPL will produce (i) studies regarding the relationship between KCPL's gaining or losing customers and the amount of coal consumed at Montrose; (ii) data showing the number of customers KCPL has served over the last five years; (iii) projections and forecasts of the number of KCPL's customers; and (iv) documents that link the number of customers to coal consumption at Montrose.

10. Forecasts Prepared by Consultants (RFP No. 20)

At the meet-and-confer session, you stated that KCPL will make an effort to obtain forecasts that were prepared by consultants that it has retained to present evidence in this case that relates to national, regional, or PRB coal demand or production, as long as the forecasts were not prepared for a specific client or available for sale to the general public.

Please let us know as soon as possible whether KCPL has been successful in its efforts so we can determine whether we need to raise this issue at the Board-sponsored discovery conference.

11. Construction or Expansion of Facilities (RFP Nos. 23 and 24)

At the meet-and-confer session, you stated that KCPL will develop a proposal for producing responsive documents regarding the new construction planned for Iatan, and will produce responsive documents with respect to other generating facilities to be included in KCPL's stand-alone railroad.

Please let us know as soon as possible what information you propose to produce with respect to Iatan so we can determine whether we need to raise this issue at the Board-sponsored discovery conference.

12. Transmission Constraints at Montrose (RFP No. 25)

At the meet-and-confer session, UP stated that it was willing to limit its request for documents sufficient to show limits on the transmission capacity from Montrose. You stated that KCPL will produce such documents.

13. Capacity Utilization (RFP No. 27)

At the meet-and-confer session, in response to UP's requests for additional documents responsive to this request, you stated that KCPL's stand-alone evidence will limit

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capacity utilization at generating facilities included in the stand-alone railroad at 85%, or at the current level, if the current level is already above 85%.

14. Rail Cars (RFP No. 34)

At the meet-and-confer session, you agreed that KCPL will produce documents sufficient to show the requested information with respect to all rail cars it owns or leases and in use for coal transportation service, not merely those rail cars used for coal transportation service to Montrose.

15. PRB Mine Ability to Meet Demand (RFP No. 36)

At the meet-and-confer session, you agreed that KCPL will produce any responsive documents in its possession that are not in the public domain.

16. Reports Provided to Stakeholders (RFP No. 49)

At the meet-and-confer session, UP agreed to clarify its request. To clarify, we are requesting copies of any regular, periodic reports provided to the Kansas or Missouri PSCs.

17. Train Operations (RFP No. 53)

At the meet-and-confer session, UP clarified and limited this request by explaining that we were seeking documents regarding (i) activities at Montrose that affected train operations and cycle times, such as documents describing problems with frozen coal and broken dumpers, and (ii) how efficiently equipment is being used in coal service to Montrose. You stated that KCPL will produce documents responsive to this request, as clarified and limited.

18. Service Term Allegations (RFP No. 55)

KCPL initially objected to producing any documents responsive to this request. At the meet-and-confer session, we explained that UP was entitled to responsive documents as part of discovery, and that we are not limited to the documents KCPL decides to rely upon in submitting its evidence. You stated that KCPL will produce documents responsive to this request.

19. Circular 111's Impact on KCPL and Customers (RFP No. 56)

At the meet-and-confer, you agreed that KCPL will produce documents relating to damages associated with its unreasonable practice allegations.

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Kelvin J. Dowd, Esq.

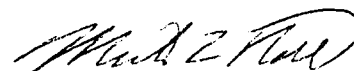
December 23, 2005

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20. Basis for KCPL's Unreasonable Practice Claims (Interrogatory No. 22)

At the meet-and-confer session, we asked whether KCPL would state which UP practices it intends to challenge as unreasonable practices. You stated that you could provide a partial list, but that KCPL reserved the right to challenge additional practices as unreasonable. Please let us know whether KCPL has changed its mind, or whether it remains unwilling to tell UP what practices it intends to challenge as unreasonable.

Sincerely



Michael L. Rosenthal

cc: Louise A. Rinn, Esq.  
Linda J. Morgan, Esq.

B



**SLOVER & LOFTUS**

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December 29, 2005

**VIA TELECOPIER AND FIRST CLASS MAIL**Michael L. Rosenthal, Esq.  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004Re: STB Docket No. 42095, Kansas City Power  
& Light Company v. Union Pacific Railroad

Dear Mike:

This responds to your letter of December 23, 2005, concerning understandings and agreements reached during our December 14 meet-and-confer session. By this letter, we also provide further clarification of KCPL's positions regarding a number of the matters that we discussed, based on investigations conducted subsequent to our meeting.

The headings set out below basically correspond to those used in your letter, though we also address a few additional items which our notes reflect were left open on December 14 but which you did not address.

**Issues Related to Both Parties' Discovery Requests****Discovery Cut-Off**

We concur in your understanding of the meaning of our agreement to cut-off discovery as of December 31, 2005. We would add, however, that notwithstanding this cut-off date, both parties are free to propound additional and/or follow-up discovery requests at least until the end of the prescribed discovery period, currently scheduled for February 10, 2006.

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Business Records

Your recitation of our agreement on this item is correct.

Issues Related to KCPL's Discovery Requests to UP

1. Request to Expedite Production

With respect to the five "priority" document categories, our notes reflect that you indicated that most of the material already had been assembled, and stated that we could expect substantial production of the requested materials, other than coal transportation contracts subject to confidentiality restrictions, by mid-January. Please confirm UP's intended schedule for production of the traffic tapes, track charts and timetables, traffic forecasts, and train movement records.

2. Documents Related to Non-Coal Traffic

In response to UP's expressed concerns over burdens associated with the production of non-coal traffic data, we explained that the principal focus of KCPL's inquiry was non-coal traffic moving south and east through the Kansas City gateway, which should limit the bounds of any necessary search. We did agree to defer any effort to compel production of this data until after a review of UP's traffic tapes and a further identification of the non-coal traffic (if any) that KCPL would expect to include in its stand-alone railroad. However, that agreement was predicated on our understanding that UP would produce the contracts and other requested documents specific to the particular non-coal traffic that we identified. Please confirm that our understanding is correct.

3. Documents Withheld Under UP General Objection No. 16

In addition to informing KCPL *whether* any documents were being withheld under this objection, our notes reflect that UP agreed to identify the documents that were being withheld. Please confirm that this is correct.

4. Item 4140 and Profitability Studies (Doc. Req. Nos. 1 and 2)

UP's general objections were quite broad in scope, and its "internal costing system" objection does not offer any specificity as to the types of data or documents that are included within its ambit. Given these ambiguities, we request further clarification whether UP now intends to produce any documents in response to KCPL's Document Request Nos. 1 and 2 other than the "publicly available evidentiary filings" referred to in UP's original response to Document Request No. 2.

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5. Planned Capacity Enhancements (Doc. Req. No. 3)

We appreciate UP's reconsideration of its objection, and agreement to produce documents responsive to our modified request as described in your letter.

6. Railcar Repair and Maintenance (Doc. Req. No. 36)

We will defer any further action with respect to Document Request No. 36 pending the results of the inquiry referenced in your letter.

7. Traffic Forecasts (Doc. Req. No. 53)

As noted with respect to Item 1, above, we request confirmation of UP's intended schedule for production of the traffic forecasts.

8. Construction Projects (Doc. Req. Nos. 115 and 116)

We will defer any further action with respect to Document Request Nos. 115 and 116 pending our receipt of UP's proposal. As with some of the other items, however, we request further clarification as to when we can expect it.

9. "Internal Cost" Objections (Interrog. No. 9 and Doc. Req. Nos. 37 and 38)

During our meeting, we explained that the data descriptions, inputs and cost information sources sought in Interrogatory No. 9 and Document Request Nos. 37 and 38 did not include UP's "internal costing system," and therefore were not objectionable under a proper reading of the *Northern States*, *Minnesota Power*, and *PEPCO* decisions cited by UP in its responses. No agreement was reached on this issue, however, and KCPL reserved its right to move to compel production of the requested information and documents.

10. Document Production Locations

UP's responses to KCPL's initial discovery requests stated that certain documents would be made available for inspection and copying by KCPL at UP's offices in Omaha, Nebraska and/or its consultants' offices here in Washington. During our meeting, we asked that UP identify the documents or categories of documents that UP would only make available for inspection and copying at sites other than your offices, so that necessary travel and other arrangements could be made. You agreed to advise us as to when these documents would be available, and confirm their location(s). We would appreciate receipt of this information as soon as possible.

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Issues Related to UP's Discovery Requests to KCPL

1. Documents Withheld Under KCPL General Objection No. 5

We confirm that documents will be withheld under this objection only when they are subject to confidentiality agreements or stipulations with third parties, or are governed by protective orders in other proceedings. Further, KCPL will take such steps as are available under the relevant agreement(s) or order(s) to enable their production to UP, subject to the protective order in place in this proceeding.

At this point, we can advise you that certain coal supply agreements responsive to UP's Document Request No. 3 and the BNSF contract discussed below contain prohibitions on disclosure absent counter-party consent and/or non-opposition. KCPL is proceeding under these agreements to attempt secure the necessary consents and produce the documents in question.

2. Documents Withheld Under Objection to Producing "All" Documents

The interpretation of this objection reflected in your letter is accurate.

By way of further response, we can now confirm that KCPL will be producing the outputs of a comprehensive computer model used to project generation costs in response to a number of individual UP requests for documents related to studies or projections of Montrose coal consumption and utilization, electric generation, power plant utilization capacity, transmission capacity, delivered fuel costs, and other related topics. This output data, which will be designated "Highly Confidential" under the governing protective order, will be produced in electronic form.

3. Objection Relating to Business Records

The interpretation of this objection reflected in your letter is accurate.

4. Coal Contracts and Related Documents (RFP Nos. 3 and 4)

Your letter accurately reflects KCPL's position regarding production in response to these requests.

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5. Fuel Surcharges (RFP No. 13)

KCPL does not agree that UP is entitled to "broader discovery" than that which is reflected in KCPL's initial response to this request. Further, KCPL specifically rejects the suggestion that its challenge to UP's fuel surcharge is "vaguely defined." To the contrary, Paragraph 23 of KCPL's Complaint specifically states that "[a]s applied to KCPL's Montrose coal traffic, this surcharge exceeds the maximum reasonable level permitted under 49 U.S.C. §10702, and therefore is unlawful."

KCPL is willing to compromise with UP on this matter, solely to narrow the range of disputed discovery issues which may have to be presented to the Board for resolution. Therefore, KCPL will produce non-privileged documents in its possession relating to fuel surcharges for rail transportation generally, without regard to the generation facility(ies) to which the rail transportation applies. In this regard, KCPL will interpret "fuel surcharge" to include any mechanism (regardless of label) in a railroad contract, tariff or pricing document which imposes a charge or assessment for the recovery of increases in fuel prices that is separate from and/or in addition to any standard, periodic rate or price adjustment mechanism contained in such contract, tariff or pricing document.

6. Documents Comparing Rates/Service at Montrose to Rates/Service at Other Facilities (RFP No. 14)

Contrary to statements in your letter, KCPL did not agree that evidence of rates or service terms applicable to coal transportation facilities other than Montrose is relevant to the question whether the service terms of UP's Circular 111 that are challenged in KCPL's Complaint are unreasonable as applied to coal transportation to Montrose, and therefore in violation of 49 U.S.C. §§ 10702 and 10746.

KCPL is willing to compromise with UP on this matter, solely to narrow the range of disputed discovery issues which may have to be presented to the Board for resolution. Therefore, consistent with the modified request described in your letter, and subject to compliance with applicable confidentiality restrictions, KCPL will produce the agreement that currently governs coal shipments via BNSF to KCPL's Iatan, LaCygne and Hawthorn Stations, and non-privileged documents reflecting the negotiations that produced that agreement, in full satisfaction of UP's RFP No. 14.

7. Dispatching Decisions (RFP No. 15)

Based upon investigation undertaken subsequent to our December 14 meeting, we can confirm that there are no documents which directly relate to the effect of coal transportation rates in isolation on KCPL's dispatching decisions, or its sales of electricity. We

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also confirm that the Montrose Station is and is projected to continue to be considered a "base load" generation facility, that is, a facility which will be run at its maximum available output (subject to planned and unexpected outages) under reasonable alternative generation cost and electricity demand scenarios.

The foregoing notwithstanding, the computer model output data which will be produced by KCPL in electronic form in response to, *inter alia*, UP's RFP No. 16, and is referenced above, will allow UP to examine the effects of a variety of components – coal transportation charges among them – on KCPL's cost of generation at each of its base load coal-fired facilities, including Montrose.

8. Studies, Forecasts and Projections (RFP No. 16)

Notwithstanding KCPL's relevance objection, which we specifically reserve and reaffirm, we confirm that KCPL will not withhold non-privileged documents containing information responsive to RFP No. 16 concerning studies, forecasts and projections for Montrose on the grounds that such documents also contain information concerning generating stations other than Montrose.

9. Gain or Loss of Customers (RFP No. 17 and 18)

Notwithstanding KCPL's relevance objections, which we specifically reserve and reaffirm, KCPL will produce documents which show the number of customers that KCPL has served during each of the last five (5) years, and projections or forecasts of future changes in the number of customers.

We also can confirm that there are no studies regarding any relationship between KCPL's gaining or losing customers and coal consumption at Montrose, and no documents that link the number of customers to coal consumption at Montrose.

10. Forecasts Prepared by Consultants (RFP No. 20)

The experts who are expected to sponsor evidence on behalf of KCPL concerning forecasts of future national, regional or PRB coal demand have agreed to the production of forecasts which they have prepared internally, and were not undertaken at the request of another client or for purposes of sale to the general public. We can confirm that there are documents which meet this description that will be produced.

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11. Construction or Expansion of Facilities (RFP Nos. 23 and 24)

As we explained at our December 14 meeting, the production of all documents related to planned construction of new generation facilities would be extraordinarily burdensome, and wholly disproportionate to any arguable relevance to the question of projected stand-alone coal traffic volumes given the multiple, alternative available sources of such information.

In response to UP's RFP Nos. 23 and 24, KCPL will produce any non-privileged documents in its possession – other than press clippings and other public information that is readily available to UP – concerning new generation facilities construction by companies other than KCPL on sites generally along the current UP route from the PRB to Kansas City. With respect to KCPL's planned construction of a new coal-fired unit at its Iatan Station, KCPL will produce documents sufficient to show the justification for construction of the unit; the estimated cost of construction; the estimated schedule for completion; the mode of coal transportation; and the projected annual volume of coal consumption upon commencement of commercial operation.

12. Transmission Constraints at Montrose (RFP No. 25)

Contrary to your letter, we did not agree to produce documents sufficient to show the limits on the transmission capacity from Montrose generally. We agreed to produce, and KCPL will produce, documents sufficient to show that the transmission capacity from Montrose is adequate to handle the electricity that will be generated by the projected annual coal consumption at Montrose.

13. Capacity Utilization (RFP No. 27)

To clarify KCPL's position: consistent with established STB precedent, the annual coal shipment volume forecasts for each generating station in the stand-alone traffic group will start with that station's actual base year (2005) volume, then will grow according to the appropriate forecast methodology until the volume reaches a level that corresponds to an 85% capacity utilization factor. Volume then will be held at that level for the remainder of the DCF period. The exception to this rule is any station that already was operating at a capacity factor of 85% or higher during the base year. For such a station, coal volume will be held constant at the base year level for the entire DCF period.

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14. Railcars (RFP No. 34)

KCPL will produce documents sufficient to show the information sought in RFP No. 34 (to the extent that it exists) for the railcars that currently are in the KCPL fleet, and will not limit production to cars used in Montrose service.

15. PRB Mine Ability to Meet Demand (RFP No. 36)

Your letter accurately reflects our agreement with respect to RFP No. 36.

16. Reports Provided to Stockholders (RFP No. 49)

In response to UP's clarified request, KCPL will conduct a reasonable search and produce the requested documents if they exist.

17. Train Operations (RFP No. 53)

Your letter accurately reflects our agreement with respect to RFP No. 53. However, please be advised that the information sought in this request, as clarified and limited, may be included in documents produced in response to other requests.

18. Service Term Allegations (RFP No. 55)

KCPL does not agree that UP is entitled to the documents sought in this request as part of the discovery process, and specifically reserves and reaffirms its initial objection.

The foregoing notwithstanding, KCPL will conduct a reasonable search for non-privileged documents that are responsive to this request, and will produce such documents as are found. Reiterating the position that we explained during our meeting, however, KCPL specifically disclaims that the documents that are produced will constitute "all documents" related to the allegations in Paragraph 27 of the Complaint.

19. Circular 111's Impact on KCPL and Customers (RFP No. 56)

Contrary to the statement in your letter, KCPL did not agree to produce all documents relating to damages associated with UP's unreasonable service practices under Circular 111. At the meeting, we represented that KCPL would conduct a reasonable search for non-privileged documents that presently exist and contain some quantification of the economic harm expected to result from these practices, and will produce such documents as are found. However, KCPL specifically reserves the right to present additional evidence respecting damages



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resulting from the actions that are the subject of KCPL's Complaint, as the same may be developed as this case proceeds. As we stated at our meeting, all such evidence as may be presented by KCPL will be accompanied by supporting workpapers.

20. Basis for KCPL's Unreasonable Practice Claims (Interrogatory No. 22)

KCPL specifically reserves and reaffirms its initial objection to UP's Interrogatory No. 22. Subject to and notwithstanding the foregoing, the unreasonable practices that are contemplated in Paragraph 27 of KCPL's Complaint may include, but may not be limited to, the following:

- (i) UP's establishment of a maximum annual coal volume limitation in Item 4140 of Circular 111 that is inadequate to meet KCPL's expected coal transportation requirements for Montrose.
- (ii) UP's establishment of minimum carload and shipment weights which preclude KCPL's continued use of certain railcars which heretofore have been used in Montrose service.
- (iii) The terms of UP's "Request for Service" rules in General Rule Item 100 of Circular 111.
- (iv) The absence of adequate provisions in Item 4140 and/or Circular 111 that would require UP to provide substitute railcars for KCPL's use in the event that KCPL-supplied railcars are damaged or destroyed.
- (v) UP's purported reservation of a right to unilaterally change service terms applicable to coal transportation to Montrose without the agreement of and with little or no notice to KCPL.
- (vi) The imposition of a requirement that all coal shipments to Montrose be scheduled on a "ratable" monthly basis throughout each year.
- (vii) The absence of a meaningful service commitment on the part of UP.
- (viii) UP's purported reservation of a right, exercisable in its "sole judgment," to refuse to accept KCPL-supplied trainsets into service despite the requirement that KCPL supply a sufficient number of railcars to transport its scheduled tonnage.

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We suggest a meeting or teleconference early next week, to advance discussion of the issues raised in your letter and this response, and otherwise work toward reaching agreement on the joint report that we are due to file with the Board on January 6.

Sincerely,

A handwritten signature in black ink, appearing to read 'KJD', with a large, stylized loop at the end.

Kelvin J. Dowd

KJD:jml

cc: Mr. David L. Laffere  
William G. Riggins, Esq.  
Louise A. Rinn, Esq.  
Linda J. Morgan, Esq.

C

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January 3, 2006

## BY FACSIMILE AND FIRST-CLASS MAIL

Kelvin J. Dowd, Esq.  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, DC 20036

Re: Finance Docket No. 42095, Kansas City Power &  
Light Company v. Union Pacific Railroad Company

Dear Kelvin:

This responds to your letter of December 29, 2005, which responded to my letter of December 23, 2005, regarding the parties' December 14 meet-and-confer session. We address only those areas in which a response seemed necessary.

### Issues Related to KCPL's Discovery Requests to UP

#### 1. Request to Expedite Production

We expect to produce traffic tapes by the end of this week, and track charts, timetables, and train movement records by the end of next week. As we explained at the meet-and-confer session, we will produce traffic forecasts as soon as possible after UP completes its official planning process, which we expect will be in January.

#### 2. Documents Related to Non-Coal Traffic

As we discussed at the meet-and-confer session, if KCPL represents that it intends to include non-coal traffic in its stand-alone railroad, UP will produce a reasonable number of contracts and other pricing documents specific to that traffic. As it has done in past rate cases, UP will provide a list of current contracts and price documents that cover traffic that moved over the KCPL route to facilitate KCPL's selection of a reasonable number of those documents.

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3. Documents Withheld Under UP General Objection 16

If UP withholds any documents based on its General Objection 16, we will describe the documents that are being withheld.

4. Item 4140 and Profitability Studies (Doc. Req. Nos. 1 and 2)

UP is not waiving its objection to producing documents related to UP's internal costing system and will not produce documents related to UP's internal costing system. UP will conduct a reasonable search for non-privileged documents responsive to KCPL's Document Request Nos. 1 and 2, and we will produce any such documents that are found, except to the extent that they are subject to UP's general objections or UP's specific objection to producing documents related to UP's internal costing system.

UP has not completed its search, but we expect to produce documents in response to Document Request No. 1 other than the "publicly available evidentiary filings" referred to in UP's original response to Document Request No. 2. We doubt that we will find documents responsive to Document Request No. 2 that are not subject to one of UP's general or specific objections, but if we find any such documents, we will produce them.

5. Construction Projects (Doc. Req. Nos. 115 and 116)

We are continuing to work on developing a specific proposal, and we hope to have one for you soon.

6. "Internal Cost" Objections (Interrog. No. 9 and Doc. Req. Nos. 37 and 38)

Although we discussed UP's "internal cost" objection in the abstract during the meet-and-confer session, I do not believe that we discussed that objection in the specific context of UP's response to KCPL's Interrogatory 9 or Document Request Nos. 37 and 38. We will be producing a tremendous amount of UP data regarding UP's costs in response to other KCPL discovery requests that appear to cover the same subject matters as these three requests. UP's "internal cost" objection does not relate to the production of such cost data. UP's objection, which we specifically reaffirm, is to the production of information related to UP's internal costing system, which appears to us to be the subject of these requests.

7. Document Production Locations

We will advise you as soon as possible if it will be necessary for KCPL representatives to travel outside of the Washington, D.C., area to review documents produced in response to KCPL's discovery requests.

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Kelvin J. Dowd, Esq.

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Issues Related to UP's Discovery Requests to KCPL

1. Fuel Surcharges (RFP No. 13)

We appreciate KCPL's agreement to produce documents responsive to this request as described in your letter.

Will you confirm that KCPL will not challenge UP's fuel surcharge as an unreasonable practice under section 10702(2) and will challenge it only as an unreasonable rate under section 10702(1)?

2. Documents Comparing Rates/Service at Montrose to Rates/Services at Other Facilities (RFP No. 14)

We appreciate KCPL's agreement to produce documents responsive to this request as described in your letter.

3. Dispatching Decisions (RFP No. 15)

We appreciate the information provided in your letter. At the meet-and-confer session, you said that you were going to determine whether KCPL could provide its dispatching model in response to UP's Request No. 15(e). Your letter does not address that point. Will KCPL voluntarily produce its dispatching model?

4. Gain or Loss of Customers (RFP Nos. 17 and 18)

We appreciate KCPL's agreement to produce documents responsive to this request as described in your letter.

5. Construction or Expansion of Facilities (RFP Nos. 23 and 24)

We appreciate KCPL's agreement to produce documents responsive to this request as described in your letter.

6. Transmission Constraints at Montrose (RFP No. 25)

We appreciate KCPL's offer to produce documents as described in your letter. We are concerned, however, that the documents you propose to produce might not show whether the transmission capacity used by Montrose will be adequate to handle not only the electricity that will be generated by the projected annual coal consumption at Montrose, but also the electricity that will be generated by all facilities that rely on the same transmission facilities as Montrose. Unless one takes account of all generating facilities that use the same transmission facilities, transmission capacity could still constrain generation at

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Montrose. Will you confirm that the documents you propose to produce will be sufficient to address this issue?

7. Service Term Allegations (RFP No. 55)

We would appreciate clarification of your disclaimer regarding the production of "all documents." Is it different from KCPL's more general objection to producing "all" documents, which you addressed on page 4 of your letter? We expect to receive all existing, non-privileged, non-duplicative documents relating to KCPL's allegation that "Circular 111 also includes service terms . . . inadequate to meet KCPL's legitimate coal transportation needs."

8. Circular 111's Impact on KCPL and Customers (RFP No. 56)

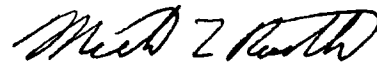
We have different recollections about what, if anything, was agreed to at the meet-and-confer session. UP is willing to limit its Request No. 56 to documents relating to the impact on KCPL or its customers of the Circular 111 service terms alleged to constitute unreasonable practices, but it is not willing to limit its request to documents that contain "some quantification of the economic harm expected to result" from the alleged unreasonable services practices.

KCPL made the decision to allege unreasonable practices. If KCPL is contemplating presenting "evidence respecting damages resulting from actions that are the subject of KCPL's Complaint," as you state in your letter, then UP is entitled to documents relating to the impact of the allegedly unreasonable practices, whether or not the documents contain "some quantification of the economic harm."

9. Basis for KCPL's Unreasonable Practice Claims (Interrogatory No. 22)

Will KCPL agree not to pursue in this proceeding any unreasonable practice claims involving issues not listed on page 9 of your letter?

Sincerely,



Michael L. Rosenthal

cc: Louise A. Rinn, Esq.  
Linda J. Morgan, Esq.

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**NORTHERN STATES POWER  
COMPANY MINNESOTA,**

**Complainant,**

**v.**

**UNION PACIFIC RAILROAD  
COMPANY,**

**Defendant.**

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**Docket No. 42059**

**UNION PACIFIC'S RESPONSES TO NSP'S FIRST SET OF DISCOVERY REQUESTS**

Defendant Union Pacific Railroad Company ("UP") responds to Northern States Power Company Minnesota d/b/a Xcel Energy, Inc.'s ("NSP") Interrogatories and Document Requests, served on February 2, 2001, and modified by letter dated from NSP counsel February 19, 2001, as follows:

**GENERAL RESPONSES**

The following general responses are made with respect to all of the interrogatories and document requests:

1. UP is conducting a reasonable search for documents responsive to the interrogatories and document requests. Subject to and without waiving the specific and general objections that follow, responsive documents will as soon as practicable be made available for inspection and copying at the offices of Covington & Burling in Washington, D.C., at the UP offices in Omaha, Nebraska, or at the offices of FTI Consulting/Klick Kent & Allen in Alexandria, Virginia, unless otherwise noted. Copies of documents will be supplied upon

**Response:**

UP objects to this request on the grounds that it is unduly burdensome, is vague, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks information that would require a special study. In addition, see General Objection No. 16.

**Request for Production No. 50:**

Please produce documents which contain data, in a computer-readable format to the extent available, for all car and train movements and yard and hub operations on UP's system associated with the NSP trains for each year or partial year 1998 to the present.

**Response:**

UP objects to this request on the grounds that it is unduly burdensome, is vague, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks information that would require a special study. Subject to and without waiving its objections, UP states that it is producing information in response to other requests herein, (e.g., Request Nos. 4 and 46), that is responsive to this request.

**Request for Production No. 51:**

Please produce documents, in a computer-readable format to the extent available, that contain the data recorded in train dispatcher sheets for each year or partial year 1998 to the present related to NSP trains.

**Response:**

UP objects to this request on the grounds that it is unduly burdensome, is vague, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks information that would require a special study. UP states that it does not maintain "train dispatcher sheets."

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## Verified Statement

of

**Samuel M. Gomez**

1. I am Samuel M. Gomez, Senior Project Manager, Economic Research & Analysis for Union Pacific Railroad Company ("UP"). I hold an undergraduate degree in Accounting from St. Ambrose University in Davenport, Iowa. I have twenty-eight years of railroad experience, most of which has been with UP. I joined UP in 1980 as a Semi-Senior Auditor, Internal Auditing. I have worked in a variety of Accounting and Planning and Analysis positions and have three years of Marketing Administration experience.

2. I have been in my current position since February 2000. One of my responsibilities is to provide logistical support for litigation, which includes coordinating the identification and collection of UP's documents and data in response to discovery requests. I have performed these duties for several rate reasonableness cases: Docket No. 42051, Wisconsin Power & Light v. Union Pacific Railroad, Decision served Sept. 13, 2001; Docket No. 42058, Arizona Electric Power Cooperative v. Burlington Northern & Santa Fe Railway (filed Dec. 29, 2000); and this case, Docket No. 42059, Northern States Power v. Union Pacific Railroad (filed Jan. 26, 2001).

3. I coordinated the identification and collection of documents and data produced to Northern States Power ("NSP") in response to its numerous discovery requests. NSP originally propounded over 100 discovery requests, which were reduced to a total of 60 document requests and 26 interrogatories after the parties agreed to limit

both RFP 24 and RFP 99. UP maintains no additional documentation on daily crew activities. There are no "train activity reports" or "conductor reports," and UP has not kept paper copies of timesheets for many years. All time and pay information on a time slip is entered in the electronic databases from which UP produced its train movement files, train crew wages, delay reports, and cycle times. Similarly, "conductor worksheets" that show only the conductor's name, the train symbol, the date and time the train arrived at the utility, and the date and time the train departed the utility are ordinarily discarded after a few weeks because this information is also contained in the cycle time reports, the train movement files, and the train crew wage information. See Exhibit A.

13. I contacted Doug Wills, Director of Operating Practices - FRA, whose verification is attached, about UP's Hours of Service recordkeeping. UP's recordkeeping complies fully with FRA's Hours of Service rules. See 49 C.F.R. § 228. The purpose of the Hours of Service rules is to ensure that railroad employees are not working excessive and unsafe hours. Hours of Service rules require UP to record how many hours each employee worked in each occupation. See 49 C.F.R. § 228.11(a)(2) & (a)(3). The Hours of Service rules do not require UP to record which specific activities each employee performed during the hours he or she worked. UP does not generate reports from Hours of Service data by either train symbol or by employee, and the FRA does not require it.

**B. Train Dispatcher Sheets: RFP 51.**

14. NSP has also requested "train dispatcher sheets" for NSP trains. I contacted Robert Seidler, Director of Centralized Dispatching Systems & Support, about this request; his verification is attached. UP has not maintained written train dispatcher

sheets for years. Dispatching information is maintained electronically in a voluminous database. The database is an operating system that aids the Harriman Dispatching Center in Omaha in dispatching hundreds of active trains over UP's 33,000-mile system. Information about trains dispatched by BNSF and other railroads is not included. (The NSP trains are controlled by BNSF dispatchers between the mines and Shawnee Junction, Wyoming.) Historical data about UP trains is used mainly to investigate train incidents. The data are only retrievable by date, time, and region -- not by train symbol, route, or commodity. Thus, the data provide only a "snapshot" of train activity in a region on a given day, rather than a "continuous" picture of train movements across regions. UP maintains other data systems for the latter purpose, and it has already produced that data to NSP.

15. UP moves approximately 400 NSP trains (loaded and empty) per year, and NSP's request seeks data for three years. Because UP would have to break up the database information into two sections to extract the data, UP would have to conduct a total of 2,400 separate searches to generate the information requested by NSP. Because it takes some 45 minutes to conduct a single search, one UP employee, working 8-hour days, would require over 225 days to search for all the data NSP requested. Additional time would be required to compile the extracted data in a readable format. As explained in paragraph 4, above, UP does not have the resources to devote to this extraordinarily burdensome exercise. Moreover, most, if not all, of the information is already included in the train movement file that UP produced.

16. As a compromise, UP proposes to produce NSP train dispatching data from the Twin Cities region for ten days in 2001. NSP may select the days.

Because this proposal would still require a UP employee to work at least 15 hours to extract the data (assuming no difficulties are encountered), NSP should be required to pay UP for labor time.

**C. Heavy Wheel Loads: RFPs 5(k)(iii) and 6(f)(iii).**

17. RFPs 5 and 6 seek a wide variety of data about UP's track characteristics and traffic for each line segment in UP's 33,000 mile system. UP produced responsive information in the form of timetables, condensed profiles, tonnage charts, a joint facilities map, and TUC data.

18. In subparts 5(k)(iii) and 6(f)(iii), NSP requested "train-miles, car-miles (loaded and empty) gross ton-miles for . . . general freight heavy wheel load traffic." UP does not maintain traffic statistics for heavy wheel loads as distinguished from other traffic. The TUC data UP produced to NSP (see paragraph 8, above), provide average characteristics for each train symbol, including the trailing weight of each train. TUC data do not provide information on a carload basis.

19. The system-wide train movement data sought by NSP are not responsive to RFPs 5(k)(iii) and 6(f)(iii). Train movement data provide only average trailing weight for each train, and -- no differently than the TUC data UP produced already -- include no statistics by carload. UP does not accumulate carload data by line segment in a manner that allows UP to produce the volume statistics for traffic that NSP defines as heavy wheel loads.

**D. Line-Specific Maintenance of Way ("MOW") Expenses: RFP 9.**

20. NSP's RFP 9 seeks line-specific or location-specific maintenance-of-way costs for each line segment on UP's system. I have spoken with Carol Kelley, Manager Budget Systems and Controller, and Mike Fletcher, Manager General Ledger

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KCPL	NSP*	TMPA**
<p><b><u>RFP 37:</u></b> Please produce documents sufficient to show the information used by UP for the following items in determining the maintenance and operating costs associated with providing coal unit train transportation services, including the definitions and decoders needed to understand each piece of information and the supporting data used to develop the information (all in a computer-readable format to the extent available):</p> <ul style="list-style-type: none"> <li>a. Roadway maintenance;</li> <li>b. Road property investment;</li> <li>c. Locomotive investment;</li> <li>d. Locomotive maintenance;</li> <li>e. Locomotive fuel;</li> <li>f. Railcar investment;</li> <li>g. Railcar maintenance;</li> <li>h. Train and engine crews; and</li> <li>i. Clerical expenses.</li> </ul>	<p><b><u>RFP 37:</u></b> Please produce documents sufficient to show the information (inputs) UP used or uses for the following items in determining the maintenance and operating costs associated with providing coal unit train transportation services, including the definitions and decoders needed to understand each piece of information and the supporting data used to develop the information (all in a computer-readable format to the extent available):</p> <ul style="list-style-type: none"> <li>a. Roadway maintenance;</li> <li>b. Road property investment;</li> <li>c. Locomotive investment;</li> <li>d. Locomotive maintenance;</li> <li>e. Locomotive fuel;</li> <li>f. Railcar investment;</li> <li>g. Railcar maintenance;</li> <li>h. Train and engine crews; and</li> <li>i. Clerical expenses.</li> </ul>	<p><b><u>RFP 36:</u></b> Please produce documents sufficient to show the information used by BNSF for the following items in determining the maintenance and operating costs associated with providing coal unit train transportation services, including the definitions and decoders needed to understand each piece of information and the supporting data used to develop the information (all in a computer-readable format to the extent available):</p> <ul style="list-style-type: none"> <li>a. Roadway maintenance;</li> <li>b. Road property investment;</li> <li>c. Locomotive investment;</li> <li>d. Locomotive maintenance;</li> <li>e. Locomotive fuel;</li> <li>f. Railcar investment;</li> <li>g. Railcar maintenance;</li> <li>h. Train and engine crews; and</li> <li>i. Clerical expenses.</li> </ul>
<p><b><u>RFP 38:</u></b> Please produce all documents related to any determination by UP of its costs of transporting coal from Origins to Destination using any of the information described in Interrogatory No. 8 [sic] and/or produced in request to Request for Production No. 38 [sic] (in a computer-readable format if available) during the period from 2002 to the present.</p>	<p><b><u>RFP 38:</u></b> Please produce all documents related to or used by UP in making any determination of its costs of transporting coal from Origin or Interchange to Destination(s) using any of the information described in Interrogatory No. 2 above and/or produced in response to Document Request No. 37 (in a computer-readable format if available) during the period from 1998 to the present.</p>	<p><b><u>RFP 37:</u></b> Please produce all documents related to any determination by BNSF of its costs of transporting coal to Gibbons Creek using any of the information described in Interrogatory No. 5 above and/or produced in request to Request for Production No. 36 (in a computer-readable format if available) during the period from 1997 to the present.</p>

\* *Northern States Power Company Minnesota v. Union Pacific R.R.*, STB Docket No. 42059, Complainant's Interrogatories and Requests for Production of Documents.

\*\* *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry.*, STB Docket No. 42056, Complainant's Interrogatories and Requests for Admissions and Production of Documents.